

FREDERIC APT )  
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 v. ) Civil Action No 01-1736  
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 LARRY G. MASSANARI )

Padova, J. November , 2001

Plaintiff Frederic Apt filed this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Defendant Commissioner of Social Security ("Commissioner") denying his claim for disability insurance benefits ("DIB") pursuant to Title II of the Social Security Act, 42 U.S.C.A. §§ 401-433 (West Supp. 2001). Both parties filed motions for summary judgment. Pursuant to Local Rule 72.1(d)(1)(C), the Court referred the case to Magistrate Judge Charles B. Smith for a Report and Recommendation. The Magistrate recommended granting Defendant's Motion for Summary Judgment. The Plaintiff filed timely objections. For the reasons that follow, the Court concludes that the ALJ's decision was supported by substantial evidence. Accordingly, the Court overrules Plaintiff's objections and adopts the Magistrate's Report and Recommendation. Defendant's Motion for Summary Judgment is granted and Plaintiff's Motion for Summary Judgment is denied.

## II. Legal Standard

Under the Social Security Act, a claimant is disabled if she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve (12) months." 42 U.S.C.A. §423(d)(1)(A); 20 C.F.R. §404.1505 (1981). Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential evaluation to evaluate disability claims.<sup>1</sup> The burden

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<sup>1</sup>The five steps are:

1. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
2. You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.
3. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
4. Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
5. Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we

to prove the existence of a disability rests initially upon the claimant. 42 U.S.C. §423(d)(5) (1994). To satisfy this burden, the claimant must show an inability to return to his former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Bowen, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971); Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). Substantial evidence is more than a mere scintilla, but may be somewhat less than a preponderance. Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979).

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will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule.  
20 C.F.R. §§ 404.1520(b)-(f).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983).

### **III. Discussion**

Plaintiff Frederic Apt filed an application for supplemental security income under Title II of the Social Security Act on October 23, 1986. An Administrative Law Judge ("ALJ") determined that Plaintiff suffered from a disabling personality disorder and awarded him benefits on February 28, 1989. On January 26, 1995, the Social Security Administration notified Plaintiff that his disability insurance benefits would end effective December 31, 1994, because he was found to have engaged in substantial gainful activity in January, 1995. (Tr. 287). Plaintiff's initial appeal and reconsideration were denied. A hearing was held before the ALJ on July 31, 1997. The ALJ found that plaintiff's work activity in January 1995 constituted an unsuccessful work attempt. However, the ALJ further concluded that Plaintiff had "engaged in substantial gainful activity after completion of his extended period of eligibility beginning in September, 1995" and terminated

his benefits as of August 31, 1995. (Tr. 18-25). The Appeals Council denied review, thereby leaving the ALJ's decision as final on February 6, 2001. (Tr. 10) Plaintiff now seeks review claiming that he is entitled to benefits for the period of September 1995 through December 1997.<sup>2</sup>

Plaintiff was employed during the relevant period in the following manner. In January 1995, Plaintiff obtained employment with International Poultry Company as a third cook. (Tr. 748). After a week in this position, he was switched largely to pot washing, because he could not keep up the pace of duties as a third cook. (Tr. 749). He was forced to resign after three weeks, however, because he had carpal tunnel syndrome and was unable to do the work. (Tr. 750-51). The ALJ determined that the January employment, although resulting in income in excess of \$500, constituted an unsuccessful work attempt. (Tr. 23.) Plaintiff next worked less than one day for Intersearch, a phone sales type job. (Tr. 752.)

Plaintiff's next employment began in September 1995 for Hallmark Marketing Corp. as an Installation Merchandiser. (Tr. 752-53.) From January 1995 through December 1995, Plaintiff earned a total of \$3,602.65, or a monthly average in excess of \$500 a month. (Tr. 358, 656-63, 725). In January-February 1996,

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<sup>2</sup>As the result of a subsequent application, Plaintiff was deemed entitled to disability benefits from January 1, 1998.

Plaintiff was transferred to a different team consisting of retired individuals who worked on an on-call, part-time basis. His 1996 earnings for Hallmark totaled \$5,873.57. (Tr. 674-86, 716, 726). In addition, he worked part-time for Penn Graphics Associates, Inc. during 1996, earning a total of \$964.50. (Tr. 717-21.) His average monthly earnings for 1996, taking into account both sources of income, exceeded \$500 per month. From January to July 1997, he worked for Hallmark earning \$3,913.77, for an average in excess of \$500 per month.

Plaintiff first objects that the magistrate adopted the ALJ's "rigid, mechanical earnings test" by failing to apply social security regulations requiring that distinct work periods involving significant changes in work patterns or earnings be assessed separately. Plaintiff claims that his work at Hallmark should have been treated as two separate work attempts, each of them unsuccessful. The first work period, according to Plaintiff, took place from September 1995 to February 1, 1996, at which time Plaintiff was transferred to the part-time team. The second work period began in February 1996 and continued until into 1997. Plaintiff claims that this work period was also unsuccessful.

The ALJ rejected this argument on the basis of the regulations contained in 20 C.F.R. § 404.1574(c). (Tr. 23.) To be considered unsuccessful, the work attempt must be preceded by a period of unemployment, must have ended or be reduced to a level below

substantial gainful activity due to the impairment or the removal of special conditions, and one of the four conditions must also be present: (1) frequent absence because of the impairment; (2) work was unsatisfactory due to the impairment; (3) work was during a temporary remission of the impairment; or (4) work was performed under special conditions essential to the performance and the conditions were removed. 20 C.F.R. § 404.1574(c) (2001). The ALJ determined that none of the requisite conditions existed. (Tr. 23.)

Although Plaintiff's objection sounds like a challenge to a legal interpretation made by the ALJ, Plaintiff's objection actually challenges the sufficiency of the evidence to support the ALJ's determination of the success of Plaintiff's work for Hallmark. An examination of the ALJ's opinion reveals not only a proper citation to the pertinent regulations, but also substantial evidence to support his conclusion that the evidence did not establish the factors necessary to deem the period from September 1995 through January 1996 as unsuccessful.<sup>3</sup>

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<sup>3</sup>Plaintiff cites to no applicable regulations other than 20 C.F.R. § 404.1574, and has identified no legal authority that was ignored by the ALJ.

Plaintiff appears to suggest that the Court should examine earnings during individual months rather than use monthly averages. Plaintiff notes, for example, that the actual earnings during several of the months in 1996 fell below \$300 a month, at which there is a presumption that the work performed was not substantial. Plaintiff cites no authority for this type of analysis; moreover, the regulations themselves refer repeatedly to "monthly earnings averaged." See 20 C.F.R. § 404.1574.

The ALJ first examined Plaintiff's salary earnings, and noted that the average monthly income met the levels necessary for a presumption that the employment was substantially gainful.<sup>4</sup> Having made that initial determination, the ALJ then proceeded to examine the remaining evidence, including the job evaluation, the letters from his supervisor and co-worker<sup>5</sup>, and Plaintiff's own testimony, to determine whether the work attempt was successful. The ALJ determined that it was successful. The ALJ relied heavily on the

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<sup>4</sup>Plaintiff appears to suggest that the ALJ erred by relying solely upon the monthly average salary amounts in determining that Plaintiff had engaged in successful substantial gainful employment. The ALJ, however, did not rely solely upon monthly average salary amounts to establish that Plaintiff's work was successful. Rather, the ALJ merely recognized that the salary amounts of more than \$500 a month raised the presumption of successful work. (Tr. 20.)

<sup>5</sup>The letters describe some of the day-to-day difficulties encountered by Plaintiff in carrying out his job, in particular his difficulty retaining instructions. For example, the July 15, 1997 letter of Mr. Joyce, Plaintiff's supervisor, stated:

Ric Apt is hard working, dependable and basically a nice young man. I have been his supervisor for almost two years. I have made special allowances for Ric, by repeating directions and work assignments to him because of an apparent lack of retention on his part. I do not need to give this assistance to other team members working for me.

Ric follows orders once they are given to him, and carries them out willingly. But, there does seem to be a learning/retention type of problem. Instructions need to be repeated to him over and over again, even for tasks he has done repeatedly.

Ric is, and can be, a valuable team member, provided he receives the right supervision and instruction. But this apparent retention problem puts him at a distinct disadvantage. Without special instruction and supervision, Ric could not perform his job satisfactorily.

(Tr. 647.)

job performance evaluation, in which Plaintiff received a rating of "superior" as to seven of 15 elements, "meets job requirements" in 5 areas, and "training needed" in 3 categories. (Tr. 730.) Plaintiff also testified that he performed the same work as his fellow employees, that he had the same hours, pay, and work duties, and that he did not require any extra help and that his work production and work quality were the same as his co-workers. (Tr. 299.) Plaintiff received cost of living adjustments until he was earning \$6.75 an hour.<sup>6</sup> (Tr. 760.)

Although the letters and some of Plaintiff's testimony suggested that Plaintiff's work was not satisfactory, the ALJ discredited this evidence in light of the performance evaluation, observing:

The undersigned Administrative Law Judge does not accept the letters from Mr. Joyce and Mr. Kaplan as credible in view of the . . . performance evaluation. Claimant's performance evaluation contains no indication of a problem as severe as those asserted to in the letters from Mr. Kaplan and Mr. Joyce.

(Tr. 22.) The ALJ further discounted Plaintiff's testimony as to unsatisfactory job performance, noting that "claimant's testimony

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<sup>6</sup>The Report & Recommendation notes that Plaintiff's salary was eventually raised to \$7.00 per hour. In a letter dated July 28, 1997, Counsel for Plaintiff noted that Plaintiff would be receiving a cost of living wage increase and a standard raise based on seniority, to an hourly wage of \$7.00. (Tr. 651.) In his objections, Plaintiff clarifies that he did not make more than \$6.75 per hour. Plaintiff also characterizes the magistrate judge as "factually mistaken" by implying that the raise was merit based. The Court, however, does not understand the magistrate to have interpreted the raises as "merit-based."

to this effect is not accepted as credible in view of the . . . performance review which included seven job elements rated as superior and the absence of a credible performance evaluation showing less than satisfactory work." (Tr. 23.)

While the Court recognizes that there was evidence in the record that might have supported a contrary determination, the ALJ's decision reflects careful consideration of all the evidence presented, as well as explanations of which evidence he determined should be weighed heavily and which evidence was "not credible." In the context of this Court's standard of review, the Court concludes that the ALJ's determination was supported by substantial evidence. Plaintiff's first set of objections are overruled.

Plaintiff's second set of objections challenge the substantiality of the evidence to support the finding that Plaintiff performed successfully in the workplace. Plaintiff specifically claims that the magistrate judge erred by: (A) accepting the ALJ's misinterpretation of Plaintiff's performance review; (B) finding that Plaintiff's own testimony supported a denial of disability benefits; (C) disregarding certain undisputed items of evidence that strongly support his claim to disability benefits; and (D) concluding that Plaintiff engaged in substantial gainful activity based simply on his continued employment with Hallmark.

Plaintiff's second set of objections, in essence, ask this Court to re-interpret specific evidentiary portions of the record to reach a different conclusion. The first, second, and third purported errors all ask the Court to adopt a different interpretation of particular pieces of evidence in the record in order to reach a different outcome regarding the success of the work attempts.<sup>7</sup> As discussed in greater detail above, however, there was substantial evidence in the record to support the ALJ's determination. The third purported error attempts to point to evidence that would require a different result; however, most of this evidence was directly addressed (and rejected) by the ALJ, and that evidence that was not is insufficient to mandate a different outcome. The Court concludes that none of these specifically alleged faults demonstrate that the ALJ's decision lacked substantial evidence to support it.

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<sup>7</sup>In particular, Plaintiff "takes strong exception to the Agency's speculative and baseless argument . . . that asserts that [Plaintiff] must have been performing his work satisfactorily because he was not fired from Hallmark and he received a pay raise . . ." (Pl.'s Obj. at 15.) However, Plaintiff overstates the extent to which the ALJ relied on this information in reaching his decision that no "special condition" existed. That decision, by the plain language of the ALJ's opinion, was based in large part on the performance evaluation and parts of Plaintiff's testimony. Moreover, while the Court recognizes that such evidence taken alone and "devoid of any context" might not be helpful, in the context of the entire record, the fact that Plaintiff was retained was certainly relevant. This is particularly true in a case such as this one in which there was a presumption of engagement in substantial employment (by virtue of the amounts earned), and part of the ALJ's task was to determine if there was any evidence to rebut the presumption.

Finally, the Court notes that the ALJ did not fail to consider evidence that Plaintiff's supervisors made accommodations for his disabilities or worked in a "sheltered" or "special" environment.<sup>8</sup> The pertinent regulations provide, with respect to accommodations, that:

When we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity. . . . If your earnings are being subsidized, we do not consider the amount of the subsidy when we determine if your earnings show that you have done substantial gainful activity. We consider your work to be subsidized if the true value of your work, when compared with the same or similar work done by unimpaired persons, is less than the actual amount of earnings paid to you for your work. For example, when a person with a serious impairment does simple tasks under close and continuous supervision, our determination of whether that person has done substantial gainful activity will not be based only on the amount of the wages paid. We will first determine whether the person received a subsidy; that is, we will determine whether the person was being paid more than the reasonable value of the actual services performed. We will then subtract the value of the subsidy from the person's gross earnings to determine the earnings we will use to determine if he or she has done substantial gainful activity.

20 C.F.R. 404.1574(a)(2) (2001). Similarly, the regulations on "sheltered" or "special" environment provide that:

If you are working in a sheltered workshop, you may or may not be earning the amounts you are being paid. The fact that the sheltered workshop or similar facility is operating at a loss or is receiving some charitable

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<sup>8</sup>There is no separate objection with respect to the "accommodations" issue. Rather, this purported error is part of Plaintiff's general attack on the sufficiency of the evidence underlying the ALJ's decision to deny benefits.

contributions or governmental aid does not establish that you are not earning all you are being paid.

20 C.F.R. 404.1574(a)(3).

The ALJ rejected Plaintiff's contention that the value of his work should be discounted because of accommodations or sheltering. The ALJ, noting that the argument relied heavily on claimant's testimony and the letters from Mr. Joyce and Mr. Kaplan as to deficiencies in Plaintiff's work performance, observed that these pieces of evidence were not credible. (Tr. 24.) The ALJ again relied heavily the good performance evaluation. (Tr. 24.) He also noted that the Plaintiff testified to receiving regular cost of living increases, and noted there was no evidence that his compensation was paid on a different basis than that of other employees. (Tr. 22-23.)

As with the other aspects of the ALJ's decision, the determination that the "accommodations" or "sheltering" provisions did not reduce the earnings amounts credited toward the average monthly earnings was supported by substantial evidence. The ALJ did not fail to address the evidence in the record in making the decision. Plaintiff's objections to this aspect of the magistrate's report and recommendation are overruled.

#### **IV. Conclusion**

For the reasons stated above, the Court overrules Plaintiff's objections and adopts the magistrate's report and recommendation consistent with this memorandum. The Court grants summary judgment

in favor of the defendant and denies the Plaintiff's motion for summary judgment. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERIC APT

v.

LARRY G. MASSANARI

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Civil Action No 01-1736

**ORDER**

**AND NOW**, this                      day of November, 2001, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, **IT IS HEREBY ORDERED** that:

1. Plaintiff's objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED** consistent with the accompanying Memorandum;
3. The Plaintiff's Motion for Summary Judgment (Doc. No. 5) is **DENIED**;
4. The Commissioner's Motion for Summary Judgment (Doc. No. 6) is **GRANTED**.

BY THE COURT:

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John R. Padova, J.